Filed 7/23/20 In re M.M. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re M.M. et al., Persons Coming Under the Juvenile Court Law.	
TUOLUMNE COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. Michael M., Defendant and Appellant.	F080549 (Super. Ct. Nos. JV7815, JV7816, JV7817) **OPINION**

APPEAL from orders of the Superior Court of Tuolumne County. Donald I. Segerstrom, Jr., Frank Dougherty (Retired Judge of the Merced County Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.), and Kate Powell-Segerstrom, Judges.†

† Judge Kate Powell-Segerstrom ruled on the order denying the Welfare and Institutions Code section 388 petition and terminating parental rights under Welfare and Institutions Code section 366.26. Both Judges Donald I. Segerstrom, Jr. and Frank Dougherty are listed in various parts of the record as finding that the ICWA did not apply on March 6, 2018.

Elizabeth C. Alexander, under appointment by the Court of Appeal, for Defendant and Appellant.

Sarah Carrillo, County Counsel, and Maria Sullivan, Deputy County Counsel, for Plaintiff and Respondent.

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In this appeal, Michael M. (father) challenges an order denying his Welfare and Institutions Code section 388[1] petition and terminating his parental rights to his three children under section 366.26, after finding that the beneficial parent/child relationship exception to adoption did not apply. He also argues inquiry and notice requirements under the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) require remand. We agree with his last contention, but in all other respects affirm.

SUMMARY OF FACTS AND PROCEDURE

Background

On Wednesday, July 5, 2017, the Tuolumne County Department of Social Services (department) received a call from paternal grandmother Terry M. (grandmother) stating that her son and his family were being evicted, and she had received a call from law enforcement to pick up her grandchildren, D.M., W.M, and M.M. While grandmother could not take them, she said she was going to contact a friend who was a foster parent. The department said they would not intervene if she was able to arrange placement.

The following day, grandmother called again, this time stating her grandchildren had no place to go and their mother, Lisa M. (mother)[2], was in a hotel room using drugs, and she and father were "out of control." Grandmother said, when she went to get the

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1 All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

2 Mother is not a party to this appeal.

children, law enforcement told her they would call the Tuolumne County Department of Social Services (department) because of the condition of the home. Grandmother said she would be bringing the children to the department.

When grandmother then met with the department, she reported that the parents were being evicted for not paying rent for six months, and they had emptied a storage locker earlier in the year and their belongings were piled up outside the home. Law enforcement reported that the inside of the home was unsanitary and cluttered. Grandmother reported that, when she picked up the children, they were in various stages of undress, missing shoes and without appropriate clothing. Grandmother purchased clothing and diapers for the children, six-year-old D.M., four-year-old W.M., and three-year-old M.M.

Grandmother stated that she had agreed to take the children for one night while the parents figured out where to live. But due to the parents' substance abuse and homelessness, grandmother did not feel safe returning the children to them. While at the department, grandmother was in contact with mother through Facebook messenger and told her she was leaving the children there. Mother responded with "u fucking lying bitch, you're going to jail for kidnapping."

Grandmother left the children at the department with two bags of clothing and diapers. After attempting unsuccessfully to contact the parents for the remainder of the day, the social worker placed the children in a foster home.

The following day, Friday, July 7, 2017, father came to the department, where he voluntarily tested and was positive for amphetamine and methamphetamine. Grandmother arrived and joined the interview. According to father, he had gotten a seven-day eviction notice and tried to pay $150 towards back rent, but it was returned unopened. He also stated there had been a "mix-up" with his required reporting to Social Services, which caused a delay in receiving cash benefits.

Father was asked if mother was using illegal substances. He said he was not sure, but "sometimes she acts like me and I'm Bi-Polar." Father admitted using methamphetamine the previous day, and he had been cited for possession of methamphetamine the previous month. He stated he began using methamphetamine in late February or early March, and had also been using heroin, which he last used five or six days ago. Father acknowledged using drugs when the children were home, but said they were sleeping at the time.

When asked what his plan for the children was, he said he planned to stay in the county and hopefully find someplace to stay. If not, he planned to take the children to the department, but hoped to do so voluntarily rather than have his mother do it.

Father stated he was bipolar and taking numerous medications. According to father, when one of his "rescue medications" changed last year, he began using heroin. The department informed father that, due to his and mother's substance use, the children would not be returned at that time. Father was provided referrals for mental health and substance abuse services and given the date of a detention hearing.

In a telephone conversation on July 7, 2017, with the department, mother denied substance use. However, on July 10, 2017, she admitted she had lied and had "used" in the past and there might still be "some" in her system.

Detention

The department filed a section 300 petition July 10, 2017, alleging the parents' substance abuse created a detrimental home environment, including an unsafe and unsanitary home, together with a failure to provide adequate shelter. (§ 300, subd. (b)(1).) The petition also alleged mother's whereabouts were unknown at the time. (§ 300, subd. (g).)

Father filed an ICWA-20 form indicating he had "Costanoan"[3] Indian heritage, which the department did not think was a federally recognized tribe. Grandmother told the department she was an enrolled member of an Indian tribe but did not know which tribe or what her number was. The department requested grandmother provide that information as soon as possible and indicated it would follow up on "clarification."

Mother completed an ICWA-20 form indicating possible Cherokee heritage, but other than the names of her parents, who were both deceased, and names of her grandparents, she had no other information.

At the July 11, 2017, detention hearing, both parents were present. The children were detained and a jurisdiction hearing set for August 1, 2017.

The department sent notices under ICWA to the three Cherokee Tribes, the Bureau of Indian Affairs (BIA), and the Department of the Interior.

Jurisdiction

The report prepared for the jurisdiction hearing stated that the parents missed the July 17, 2017, visit with the children due to mother testing positive and father failing to arrive on time. Father reported he had been sober from 2011 to 2015, when he relapsed, and he was recently cited for possession of methamphetamine. It was recommended that father be assessed for Dependency Drug Court (DDC).

The matter was continued to August 8, 2017, due to ICWA issues. At father's request, the hearing was then continued to August 22, 2017.

A first addendum report reviewed 21 past referrals involving mother and father from four different counties between 2012 and 2017. The referrals reflected substance abuse, mental health issues, and homelessness. The parents were banned from shelters in multiple counties due to the parents' drug use, domestic violence, and behavior issues.

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3 It is assumed father was referring to the Ohlone Costanoan Esselen Nation, which is not currently a federally recognized tribe. <http://ohlonecostanoanesselennation.org> [as of July 15, 2020].

In a meeting with the department on July 12, 2017, father described his bipolar disorder as being a "rapid cycler." He reported hearing voices and had a history of self-soothing with illegal drugs and alcohol, as he thought these drugs helped treat his symptoms.

Both parents reported being stressed over their recent eviction and current homelessness. Although they were given a list of affordable housing, they did not think they could get housing from any of the listed complexes. As of July 27, 2017, the parents were still homeless.

The parents were not visiting the children regularly, as they either arrived late, provided positive drug tests, or did not test. When father did visit, he was appropriate with the children most of the time but did have to be redirected from having adult conversations with them at times.

The report listed the dates that the ICWA-30 forms were received by the three Cherokee Tribes and the BIA, but no return receipts were attached to the report.

A second addendum report was filed prior to the August 22, 2017, hearing. It stated that the continued missed visits by the parents was creating negative behavior on the part of the children, who were "inconsolable" when the visits were cancelled at the last minute. The parents were asked to arrive 90 minutes prior to the visits to prevent the children from being transported if the visit was not going to occur.

On August 14, 2017, father arrived too late to test before the visit. Mother arrived and tested positive for methamphetamine. When told she could not visit, she collapsed on the ground, sobbing. The social worker tried to console mother and offered her substance abuse and mental health services. Mother insisted that she could only get sober if her children were returned to her. When the parents left the department, father was seen yelling at mother. Several visits were specifically moved at the parents' request to celebrate the children's birthdays, but then the parents failed to show.

The foster mother noted the children were adjusting but exhibiting "maladaptive" behaviors. The youngest child was beginning to catch up on milestones, such as dressing himself and interacting with other children.

Father continued to deny substance use, even though he tested positive on July 31, 2017. He refused to test after that date.

Neither parent appeared for the August 22, 2017, jurisdiction hearing. The juvenile court found that the parents were voluntarily absent and found the petition true. Disposition was set for September 5, 2017.

Disposition

The report prepared for disposition recommended services for both parents. The social worker was unable to obtain a social history from the parents. She was unable to locate the parents and when she did, in a campground, mother said she had either broken or sprained her ankle and needed to go to the hospital. The social worker transported the parents to the hospital rather than conduct an interview.

In mid-August 2017, during a visit with the children at the foster home, the social worker learned that, prior to being placed in foster care, the children all urinated outside because they did not have a toilet. The oldest child also stated, "they never had enough food to poop."

On August 30, 2017, the parents admitted they had still been using and tested positive. They claimed to have attended one 12-step meeting. Neither had connected with any of the other service providers they had been referred to.

The children were all reported to be healthy, but "greatly lacking social skills." The oldest child enjoyed school, but was caught stealing food, which he said he did because he used to have to steal food. He asked that meals be prepared for father to take to his visit with him.

The middle child also stole food from other children's plates when he first entered foster care, but that behavior had ceased.

The youngest child was having trouble being toilet trained and would intentionally defecate in his pants to get attention. When disciplined, he would state that his parents let him do what he wants.

The parents continued to miss visits for a variety of reasons and visits were reduced.

The social worker now recommended that evaluation for DDC be delayed until the parents could stabilize somewhat to give them a better chance at success. The report noted the parents' lack of insight connecting their substance abuse and resulting homelessness with the impact that instability had on the children. The parents' mental health needed to be addressed before their substance abuse issues. Father was to participate in mental health medication monitoring and evaluation and then comply with recommended substance abuse treatment. The case plan directed the parents to begin by attending at least three 12-step meetings per week, and they would later be assessed for DDC. Father was also to obtain medication management for his mental health diagnosis and participate in individual counseling.

Father was present, mother was not, at the disposition hearing September 19, 2017. The juvenile court adopted the recommendations of the department. The six-month review was set for March 6, 2018.

Six-Month Review

The report prepared for the six-month review recommended that the parents receive an additional six months of services and that they be ordered into DDC. The report recommended that the court find the ICWA inapplicable.

A letter was received from the Eastern Band of Cherokee Indians stating that the children were not eligible for enrollment in their tribe. No other tribe had responded, but over 60 days had elapsed since notice was sent. The department requested that the juvenile court find the ICWA did not apply.

The parents continued to be homeless, living in a camp in Sonora. They had reached the maximum benefits of Temporary Homeless Assistance, and they were not allowed back at the homeless shelter due to a conflict between father and the staff. They were unemployed and receiving Medi-Cal and welfare-to-work benefits, but no longer receiving food stamps, because they failed to complete the recertification process. They used a bicycle, buses and walking as their mode of transportation.

The children were moved to another foster home in Calaveras County, with a foster parent better able to address the behavior issues the children presented. The oldest child had been aggressive in the previous home, and he showed less inappropriate behavior in the new home.

Father was not in compliance with his treatment plan. He had not provided information regarding his mental health medication; he had not begun counseling; had not followed up on his application with a case management service; and had not begun parenting classes. He said he attended "a couple" of NA/AA meetings during the six-month period but provided no verification. He tested positive for methamphetamine four out of 10 times between September 2017 and February 2018. Although not part of his case plan, he was offered inpatient substance abuse treatment, but declined.

Mother was also not in compliance with her plan. She consistently tested positive for methamphetamine. Inpatient treatment was arranged for her, but she refused.

Father missed most of his visits with the children. He missed 10 visits during the reporting period because he would either cancel or test positive and be unable to visit. When he did visit, he was appropriate with the children. At visits, the children expressed concern over mother's living conditions. Mother missed 19 visits during this period.

At the March 6, 2018, six-month review hearing, the court ordered both parents into DDC. The ICWA was found not to apply. A 12-month review hearing was set for August 14, 2018.

12-Month Review

The 12-month review report recommended that both parents receive additional services. At the six-month review, father had been ordered into residential treatment. Father completed an application and was to call daily to remain on the waiting list. He called for a time, but then quit. Two months later, funding was approved for another treatment program, which he entered on May 22, 2018, and tested positive for THC and amphetamine at admission. On June 14, 2018, father did not have a sponsor as yet and was very focused on mother, stating that, if she became homeless, he would leave the treatment program. Father was doing individual counseling at the treatment center and, on August 2, 2018, the counselor reported that father was doing "exceedingly well" in the program, but was concerned that father's relationship with mother would impact his sobriety following treatment.

Mother entered treatment on March 23, 2018, and she completed 90 days of treatment in June of 2018. Upon completion, she re-entered DDC, but had received four order to show cause (OSC) violations for lack of compliance. Shortly after her release to a sober facility, she began testing positive for methamphetamine and had five positive tests between July 9 and 23, 2018.

While at the treatment program, father visited the children once a week, with the foster family providing lunches. Father played with the children and appropriately disciplined them during visits.

The children continued to have issues while in foster care. The oldest was generally helpful and happy, but he continued to lie and occasionally steal. He had recently obtained matches and attempted to start a bush on fire. He had anger outbursts and showed oppositional behavior during visits with his parents. He was being reassessed for counseling. The middle child was exhibiting aggressive behavior with violent angry outbursts and had recently displayed animal cruelty by picking up two

small dogs and throwing them, causing injury. He was in counseling and additional services were being sought. The youngest child was doing well.

The proposed plan for father emphasized that father was to provide a residence free from controlled substances, as well as individuals known to have ties to drugs and illegal activities, and free from health and safety hazards. Visitation was to be supervised, at a minimum of once per week.

Father appeared at the August 14, 2018, 12-month review hearing; mother did not. The juvenile court continued services for both parents and adopted the proposed case plan. It further ordered that, when father completed residential treatment, he was to re-enter DDC. An 18-month review hearing was set for January 8, 2019.

Father began appearing in DDC, and on November 20, 2018, the juvenile court ordered that all visits were to be at the visitation center with a supervisor.

18-Month Review

The report prepared for the 18-month review recommended that services be terminated for both parents and a section 366.26 hearing set. The report stated that father had graduated from the residential treatment center and the parents had been living together at an apartment complex, with rent and utilities paid for by father's sister. Both parents were unemployed and were not seeking employment. Father said he would look for work after he completed scheduled dental procedures. The parents were provided transport to medical appointments.

The oldest child was doing better at home, but he was acting out at school. He exhibited some anger outbursts and oppositional behavior during visits with his parents. He was in counseling. The middle child had decreased aggressive behavior and continued in counseling. The youngest child was doing well, other than showing jealousy towards a new child in the foster home. The children's caregiver said that the children did well with structure and a schedule.

Father continued to test negative for drugs and was making positive strides in his recovery, but his treatment team was concerned he was still in a relationship with mother, despite her ongoing struggles with addiction. Father was made "fully aware on multiple occasions" that his living situation with mother could potentially impact his own recovery and would impact his ability to reunify with his children. When recently "challenged" to ask mother to leave the house, father was unable to do so.

Father was now taking several medications for his bipolar disorder, and he reported that it helped his symptoms. He was not, however, participating in individual counseling.

Once father left the treatment center, visits were moved to the visitation center. Towards the end of August 2018, the parents began to no-show or visits were cancelled due to the parents failing to drug test or self-reported illness. Mother repeatedly failed to participate in visits due to positive drug tests. When visits were moved to another location closer to the children's placement, father attended approximately 65 percent of the visits, but frequently cut those visits short, asking to leave early or arrive late. In October a three-hour weekly visit was added for father only, but he did not take advantage of it until November. During the visits, father was generally good with the children, but had difficulty setting limits and determining discipline strategies. He also had difficulty prioritizing his children's needs over his own or mother's needs. He continued to lack insight into how lack of attendance at visits upset and confused the children, and how his choosing his and mother's needs over the children impacted them.

While father verbalized that he would choose his children over mother, he had not done so. He had very recently asked that mother be included in all the visits. Father was also putting his housing at risk because he knew mother was bringing drugs into the home and his sister would only pay for housing as long as they remained sober.

The report stated that, after 18 months of intensive services, the risk of harm to the children continued to be high and recommended services be terminated.

At the February 22, 2019, contested 18-month review hearing, father testified that he liked DDC because it told him exactly what he needed to do. But when it was pointed out that his case plan stated that he was not to be around people who were using drugs, he claimed that he did not know mother was using. But he did acknowledge that mother got kicked out of DDC and that he found drugs in the apartment in October. According to father, mother moved out of the apartment in January, but he was still providing her with food, assisting her, and storing her belongings. When asked if he could take custody of the children that day, father said the house would need "a hell of a lot" of cleaning and it would be "one hell of a thing to do." He said he would need more of an integration period, as the most important thing right now was for him to get his dental work completed. Father was last employed in 2010.

Father testified that, if he got overnight visits with the children, he would do them at his mother's house. He did not want the children back that day, saying that would be "a bad thing," and would be too much stress.

The juvenile court terminated services as to mother. But for father, it determined the meaning of section 366.26, subdivision (b) to include father's circumstances, and offered father services to the 24-month hearing, scheduled for June 25, 2019.

Shortly after extending services to father in February of 2019, he began receiving OSCs in DDC for failing to attend sufficient meetings and other required services.

At DDC on April 9, 2019, father was specifically directed to focus on getting the home set up for the children's return. In May of 2019, visits were moved to a library/park complex.

24-Month Hearing

The report prepared for the 24-month hearing recommended termination of services for father. Father's sister gave notice that she would not pay for housing after July 19, 2019, and father had not secured any alternate housing. Father was counseled throughout the review period about seeking housing options and not relying on his sister

for financial assistance. Father insisted that, because his sister would pay as long as he stayed sober, he did not think he needed to worry about housing at "the moment." He also said that, if he found cheaper housing, his sister might pay for a longer period of time, but he had not looked for cheaper housing. Father insisted he would focus on housing and employment after he took care of his dental issues. Father realized that he could not have his children in his current one-bedroom apartment and that his sister did not want to pay for a furnished two-bedroom, but father did not want to live in an unfurnished two-bedroom apartment.

Although father was referred to public health housing assistance and SSI, he did not follow through as the process was too long and he felt he had "more important things to do at the moment." Father continued to allow mother into the home on multiple occasions.

In March of 2019, father's substance abuse counselor reported that father had issues stemming from his inability to effectively address challenges that disrupted his normal, predictable routine.

On June 14, 2019, the children were moved to a prospective adoptive Resource Family Approval home. The family had cared for the children for respite on several occasions and the children enjoyed the family.

During the reporting period, father received six OSCs in DDC, for missing 12-step meetings and failing to drug test.

Father was reticent when the DDC moved visits in April 2019 to the library/park complex, stating it was difficult to handle all three children with different needs at the park. He was upset at the change, but a social worker walked him through a plan to handle the children in the more open setting. Once visits started, he was able to manage the visits and only missed two scheduled visits during the review period. During visits, father demonstrated he understood the children's different likes and dislikes and attempted to meet them. But in May, father became angry when mother's visit was

cancelled due to her not testing and admitted drug use, and the parents left together before the visit began.

After father's sister informed him that she would no longer pay for his housing after the middle of July 2019, a plan was outlined for father to apply for Section 8 housing and SSI, and to seek employment.

It was reported that the oldest child stated he loved his parents and that he was excited to move to his new prospective adoptive home. The middle child said he missed his parents.

The social worker opined that father's inability to attend his required 12-Step meeting and counseling sessions demonstrated his lack of ability to meet his own needs. The children would require substantial additional needs for schooling and appointments, which father would have to accommodate into his schedule, and he had not demonstrated that he could provide for his children's safety and well-being. The social worker noted that, while father had made changes and progress for himself, he had not made significant progress in obtaining housing and employment necessary to help meet the needs of his children.

Father appeared at the hearing on June 25, 2019; mother did not. Father, through counsel, stated he was not in a position to take the children at that time and it would not be in their best interest. Services were terminated and a section 366.26 hearing set for October 22, 2019. On that date, a contested hearing was requested and set for November 21, 2019.

Section 366.26 Report

The report prepared for the section 366.26 hearing, recommended termination of parental rights and placement of the children for adoption with their current caregivers.

The children had been slowly transitioning to their new home since December of 2018, and moved in on June 14, 2019. The caregivers had taken time off work under the

Family Medical Leave Act during the summer to bond with the children and began to establish a long-term relationship. The children were comfortable with the family.

The oldest child, now nine, was described as a bright and helpful child. But he continued to work on telling the truth and on not becoming defiant if he did not get his way. He still became frustrated at times, hitting and kicking his brothers, and continued in counseling. The middle child, now seven, was receiving extra help at school, would be getting an Individualized Educational Program and, while his aggressive behavior was decreasing, he still had occasional sexualized behavior. He continued with counseling as well. The youngest child, now five, showed some aggressive behavior toward his brothers when not being watched, but was not in need of counseling.

The current caregivers were a licensed Resource Family Approval home and wished to adopt the children. They demonstrated good parenting practices and had the capability to meet the children's needs.

Section 388 Petition

On November 14, 2019, father filed a section 388 petition requesting return of the children and "if possible, resume services." As a change of circumstances, father reported he had obtained an apartment and was employed. Under the statement of best interests, father stated: "I am now in a position to provide a home for my children. I believe placement with me, as their father, would benefit them." There were no attachments to the petition. The court set the petition for hearing on whether to hold an evidentiary hearing to coincide with the scheduled section 366.26 hearing.

Section 388 Petition and Section 366.26 Hearing

At the November 21, 2019, hearing on the section 388 petition, father's counsel made an offer of proof and the court granted an evidentiary hearing. Father called the social worker, Jewel Snyder, who testified that father had continued to test negative since services were terminated in June of 2019, and there were no reports of inappropriate behavior during visits, although visits had tapered off since services were terminated.

On cross-examination, the social worker reported that, at the time services were terminated, father was living in an apartment paid for by his sister. After his sister quit paying, he lived in a shelter for a time. He was now back at the same apartment and his sister was again paying for the apartment.

The social worker testified that, at the time of the 24-month hearing, father had an apartment, but was unable to make payments. He did not have transportation to get his children to appointments, and he was still struggling with dental issues and counseling, not attending regularly. In the social worker's opinion, father's situation had not changed since termination of services. He was still in housing he could not afford and he did not have transportation. Two of his children were in need of weekly counseling. And one of the children had been suspended from the school bus and had to be picked up from school. There would need to be daycare to allow father to work. The social worker had no concerns about the current caregiver's ability to meet the children's needs.

Father testified that he was homeless on July 25, 2019, and was at a shelter for approximately two and a half months. He then got a job and left the shelter because he "had been told" he had a two-bedroom furnished apartment "waiting for [him]" at the previous apartment complex. The rent, $2,700 per month, was being paid for by his sister until he had enough money saved up; his "checkout date" (this was a corporate complex without a lease) was now December 2, 2019. Father felt that, as long as he stayed clean, kept his employment, and could keep his family together, the apartment was being paid "for right now."

Father testified he was working as a house aide at an inn, 40 hours per week, at $11.50 per hour. If he got custody of his children, the inn would work with him to change his hours to school hours only. He understood he would be making less if he cut his hours to accommodate the school schedule, but said he could apply for Section 8 housing and he could be on cash aid for a period of time, if need be. Father thought all three children could sleep in one bed together.

Father described that, during visits, he finds out what is going on with each child and tries to teach them something. He was not able to contact the children outside of visits because of his work and the caregiver's schedule. Father testified that for transportation he used friends who give him rides and a bicycle.

Father testified he is taking his bipolar medication and has a "rescue medication" if needed. He had last used it a couple of weeks ago.

Father stated that mother knows where he lives, and he had had some contact with her through texting. According to father, he had filed for divorce from mother.

Father had not been in counseling for four months, as he said it took too much time out of his schedule.

For the section 388 petition change in circumstances requirement, counsel for father argued that, since termination of services, father was not using controlled substances, he was now employed and had a place for the children to live. Counsel argued father "has shown that he has been able to pull things together and take care of his children."

Counsel for the department argued that the only changes were that father was now employed and that he had filed for divorce from mother, although he had earlier said he had already severed that relationship.

The juvenile court found the only real change was father's job, which it stated was "a fragile situation" and would be made more fragile if the children were added to the equation. It found father's furnished apartment with a "gigantic" rent unsustainable. While the court found father's achievement of being clean and sober extraordinary, it was not a change in circumstance since the termination of services.

The juvenile court also found that the petition did not meet the best interest of the children requirement. The children were currently in a stable placement, where they were welcome and well cared for. As stated by the court:

> "So everything that Mr. [M.] has done is impressive and puts him in good stead for his future, but it does not fit into the two prong definition of giving relief from and overruling the Court's prior order."

The court denied the petition, noting that the standard was not father's best interest, but the best interest of the children.

In addressing the section 366.26 hearing, father's counsel submitted on his testimony, with an objection to termination of parental rights.

Counsel for mother then argued that the children had a strong bond with father and maintaining that relationship would outweigh the benefits of adoption. Counsel for father merely concurred.

The juvenile court disagreed that father met his burden on the beneficial parent/child relationship exception and terminated parental rights.

DISCUSSION

I. THE SECTION 388 PETITION

We turn first to father's argument that the juvenile court erred when it denied his section 388 petition. We address the merits after setting forth the law governing such petitions and the standard of review, and we find no error.

A. Section 388 Petitions and the Appellate Standard of Review

Section 388, subdivision (a)(1) provides in relevant part: "Any parent or other person having an interest in ... a dependent child of the juvenile court ... may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court ... for a hearing to change, modify, or set aside any order of court previously made[.]" At a hearing under section 388, "[t]he burden of proof ... is on the moving party to show by a preponderance of the evidence both that there are changed circumstances or new evidence and that also a change in court order would be in the best interest of the child." (*In re D.B.* (2013) 217 Cal.App.4th 1080, 1089; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*).)

A ruling on a section 388 petition is "committed to the sound discretion of the juvenile court, and the trial court's ruling should not be disturbed on appeal unless an abuse of discretion is clearly established." (*Stephanie M., supra,* 7 Cal.4th at p. 318.) " ' "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." ' " (*Id.* at pp. 318-319.) Where the appellant contends the trial court has abused its discretion, the appellant's showing on appeal " 'is wholly insufficient if it presents a state of facts ... which ... merely affords an opportunity for a difference of opinion. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' [Citation.]" (*In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 138.) "The Court of Appeal is not a second trier of fact[.]" (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1021.) Given the wide latitude afforded to the juvenile court, the denial of a section 388 petition rarely merits reversal as an abuse of discretion. (*In re Daniel C.* (2006) 141 Cal.App.4th 1438, 1445.)

Father's task on appeal is difficult, because he bore the burden of proof in the court below. (*In re D.B., supra,* 217 Cal.App.4th at p. 1089.) Thus, to the extent he challenges the juvenile court's factual findings, "the question becomes whether [father's] evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' [Citation.]" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

In "determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case." (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189; see *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450–1451.) It is also appropriate for the juvenile court to consider the strength and bonds between the dependent children and parents, as well as the bond between the children and the caregivers. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.)

Section 388 petitions brought on the eve of a section 366.26 hearing are disfavored, because, at that point, "the children's interest in stability [is] the court's foremost concern and outweigh[s] any interest in reunification." (*In re Edward H.* (1996) 43 Cal.App.4th 584, 594.) Therefore, the primary focus of a section 388 petition, at this stage of the proceedings, must be the best interest of the children. (*In re Ramone R.* (2005) 132 Cal.App.4th 1339, 1348–1349.) The ability to bring a section 388 petition on the eve of a termination hearing is only an " 'escape mechanism' " for a parent who "completes a reformation" after termination of reunification services, but before the actual permanency planning hearing. (*In re Kimberly F., supra,* 56 Cal.App.4th at p. 528; see *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

B. Father Fails to Show Changed Circumstances and Best Interests

To prevail on his section 388 petition, father was required to show changed, not merely changing, circumstances. (See *In re Casey D.* (1999) 70 Cal.App.4th 38, 49 [juvenile court entitled to deny § 388 petition where it found mother's "circumstances were changing, rather than changed"].) To support such a petition, "the change in circumstances must be substantial." (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223.) Indeed, "[t]he change of circumstances or new evidence 'must be of such significant nature that it requires a setting aside or modification of the challenged prior order.' [Citation.]" (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 615.) Last-minute changes, even if genuine, do not "automatically tip the scale in the parent's favor." (*In re D.R.* (2011) 193 Cal.App.4th 1494, 1512.)

In determining whether a legitimate change of circumstances has been achieved, the court is directed to review the seriousness of the reason for the dependency and the reason the problem was not overcome; the relative strength of the parent-child and child-caregiver bond and the length of time the children have been dependents; the nature of the change in circumstances; the ease by which the change could be achieved; and the

reason the change was not made sooner. (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685; *In re Kimberly F., supra*, 56 Cal.App.4th at pp. 530–531.)

Here, from the very beginning of the case, the overriding issue was that the parents were not providing proper housing for the children, caused by father and mother's substance abuse, father's mental health issues, and the fact that neither father nor mother was employed. Over the course of the lengthy dependency, father made major changes—by the time of the termination hearing, he had obtained and maintained sobriety for approximately 18 months; he had gotten his mental health issues under control; and he was employed. However, he was unable to mitigate the very issue that brought the children into care.

Instead, father continually prioritized his own needs over those of the children. He was not able to apply for SSI or Section 8 housing because he was trying to have dental work done. After completing substance abuse treatment, instead of making himself capable of affording an apartment or finding one, he relied on his sister to "rescue" him and pay for an apartment. When she quit paying rent, he went to a homeless shelter. When she again began paying rent, with the provision that father take over rent in the near future, father did not immediately explore alternate affordable housing arrangements, but instead said he was not worried as the apartment was being paid for "for now." Father exhibited a total disconnect between his minimum wage employment and the exorbitant price of the apartment.

At the hearing on the section 388 petition, although father was seeking immediate placement of the children, he had not yet determined how many hours he could work if the children were with him, or how it would impact his income. He did not know where the school bus stop was and had not yet considered childcare options. Father testified that he understood he would be making less if he cut his hours to accommodate the school schedule, but claimed, if that was the case, he could apply for Section 8 housing and could be on cash aid for a period of time, if need be. But father had never followed

through on applying for housing during the lengthy pendency of the case, and he showed no ability to do so.

In addition, father presented no evidence that placing the children with him would be in their best interest. The children had been out of father's custody for 30 months, and had not spent even one night with him since the beginning of the proceedings. And father presented no evidence, or even acknowledged that he was aware of, the different forms of acting out behavior the children had exhibited and their need for structure and routine.

It is true, as father contends on appeal, that it is neither inappropriate or shameful for a person to need the assistance of social services and supplemental income to provide for oneself and family. However, in father's case, he repeatedly demonstrated his inability to initiate or follow through to utilize those services, as evidenced by the fact that he had not applied for housing or SSI, and had not followed the requirements to continue receiving food stamps. This inability did not bode well to demonstrate how he was going to juggle the needs of three children.

By contrast, the children were in a good home where their needs were being met. They were integrating into a family that hoped to adopt them, providing them with permanence and security.

Father has not demonstrated by a preponderance of the evidence that he made a substantial change in circumstances or that the proposed change in order was in the best interest of the children. We find no abuse of discretion on the part of the juvenile court in denying father's last-minute section 388 petition.

II. THE BENEFICIAL PARENT-CHILD RELATIONSHIP EXCEPTION

Father also contends the juvenile court erred in terminating parental rights because there was substantial evidence he maintained regular visitation with the children and that the children would benefit from continuing the parent-child relationship. As we discuss, father's contention is without merit.

At the permanency planning hearing, the juvenile court determines a permanent plan for the child, and may order one of three alternative plans: adoption, guardianship, or long-term foster care. (§ 366.26, subd. (b); see *In re J.C.* (2014) 226 Cal.App.4th 503, 528.) " '[T]here is strong preference for adoption over the alternative permanency plans.' " (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 395.) Generally, if the court finds the child adoptable the court must terminate parental rights. "[T]o avoid termination of parental rights and adoption, a parent has the burden of proving, by a preponderance of the evidence, that one or more of the statutory exceptions to termination of parental rights set forth in section 366.26, ... apply." (*In re Anthony B., supra,* 239 Cal.App.4th at p. 395.)

A. Legal Principles Regarding the Benefit Exception

The benefit (or parental bond) exception exists where "[t]he court finds a compelling reason for determining that termination would be detrimental to the child" (§ 366.26, subd. (c)(1)(B)) because "[t]he parents have maintained regular visitation and contact with the child *and* the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i), italics added.) In deciding whether the exception applies, " 'the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer.' [Citation.]" (*In re J.C., supra,* 226 Cal.App.4th at p. 528.) " 'If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.' " (*Id.* at pp. 528–529.)

The factors the juvenile court considers in making this case-by-case assessment include: " 'The age of the child, the portion of the child's life spent in the parent's custody, the ... effect of interaction between the parent and the child, and the child's particular needs.' " (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1166.)

The benefit exception "does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.) "It is not enough to show that the parent and child have a friendly and loving relationship." (*In re J.C., supra,* 226 Cal.App.4th at p. 529.) " ' "[A] child needs at least one parent. Where a biological parent ... is incapable of functioning in that role, the child should be given every opportunity to bond with an individual who will assume the role of a parent." [Citation.]' [Citation.]" (*Ibid.*)

B. Standard of Review

Appellate courts are divided over the appropriate standard of review to apply to an order determining the applicability of the beneficial parent-child relationship exception.[4] Some courts have applied the substantial evidence test (e.g., *In re G.B., supra,* 227 Cal.App.4th at p. 1166), while others have applied the abuse of discretion standard (e.g., *In re Jasmine D., supra,* 78 Cal.App.4th at p. 1351). Still other courts have adopted a mixture of both standards, applying the " 'substantial evidence standard of review to the factual issue of the existence of a beneficial parental relationship, and the abuse of discretion standard to the determination of whether there is a compelling reason for finding that termination would be detrimental to the child.' " (*In re E.T.* (2018) 31 Cal.App.5th 68, 76.)

Our conclusion in this case would be the same under any of these standards because the practical differences between them are "not significant," as they all give deference to the juvenile court's judgment. (See *In re Jasmine D., supra,* 78 Cal.App.4th at p. 1351.) " '[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling.... Broad deference must be

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4 This issue is currently before the Supreme Court in *In re Caden C.* (2019) 34 Cal.App.5th 87, review granted July 24, 2019 (S255839).

shown to the trial judge. The reviewing court should interfere only " 'if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he [or she] did.' " ' " (*Ibid.*) Moreover, a substantial evidence challenge to the juvenile court's failure to find a beneficial parental relationship cannot succeed unless the undisputed facts establish the existence of those relationships, since such a challenge amounts to a contention that the "undisputed facts lead to only one conclusion." (*In re I.W., supra.*, 180 Cal.App.4th at p. 1529; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314.)

C. Analysis

Here, there was little discussion about the beneficial parent-child exception at the section 366.26 hearing. Evidence utilized for the section 388 petition hearing was considered for the section 366.26 hearing. The argument that the beneficial parent-child relationship exception applied to father was made by mother's counsel, who simply stated that the children had a strong bond with father and maintaining that relationship would outweigh the benefits of adoption. Father's counsel, without any argument or additional evidence, merely agreed. The juvenile court then stated that it "disagreed" that the exception applied, without further explanation.

On appeal, father contends the first prong of the exception, that he visited regularly, was met. Respondent disagrees, noting that the only time father visited as much as allowed was during the last reporting period, from June to November of 2019. Prior to disposition and in the first reporting period, father visited rarely, either because he tested positive, was unable to test, or failed to show, which caused a devastating effect on the children. During the first six months of the case, father missed 10 visits due to positive drug tests or cancelling the visits. He did not seem to comprehend or acknowledge that this negatively affected the children.

Father did not begin visiting regularly until May of 2018, a full 10 months into the case, when the children were brought to his substance abuse treatment facility. Once

released from the treatment center in August of 2018, both mother and father started to no-show for visits, again due to failing to drug test or self-reported illness. After visits were moved to another location, father attended approximately 65 percent of the visits, but often requested that they end early or begin late. Father did not take advantage of an additional three hours per week visits until a month after it was instituted. All the while, father continued to lack insight into how the irregularity of visits confused and upset the children.

At the 18-month review hearing, father testified that he had been encouraged to increase visitation and start overnight visits in order to speed up reunification, but he failed to do so. It was not until the final reunification period that father's attendance at visits improved, missing only two visits during the six-month period.

We will not speculate as to what constitutes "regular and consistent" visitation other than to say, on the facts of this case, father had not met this prong. As noted above, the beneficial relationship must be examined on a case-by-case basis, taking into account the many variables that can affect the parent-child relationship. (*In re Anthony B., supra,* 239 Cal.App.4th at pp. 396–397.)

Even assuming, arguendo, that father met the first prong of the exception by maintaining regular visits with the children, he did not meet his burden on the second prong—that the parent seeking to establish the beneficial relationship exception to adoption must prove *not only* that it would benefit the child to continue the parental relationship, but also that continuing the relationship would "promote[ ] the well-being of the child to such a degree *as to outweigh* the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575, italics added.)

Under the balancing test set forth in *Autumn H.*, we conclude the juvenile court acted within its discretion in terminating father's parental rights. While father and the

children may have a loving relationship, and father identifies ways he was appropriate and met the children's needs during supervised visits, outside of visits, father's slow follow through on drug treatment, his mental illness, and housing made him unreliable and neglectful. These young children, who were removed at ages three, four, and six, had been out of father's custody for 30 months, needed responsible parenting outside of weekly visits. In all that time, father never progressed to overnight visits, and for the most part, had only supervised visits with the children. At the time of the permanency planning hearing, his living situation was still "fragile," as noted by the juvenile court, and he still had not shown he was able to put the needs of the children over his own needs.

The record also shows that the children, who all had special needs for emotional support and educational purposes, were being cared for in a prospective adoptive home where their physical, developmental, emotional and daily needs were being met. The court could reasonably conclude that the children's well-being would continue to improve when permanently adopted by fully attentive parents.

Here, the juvenile court determined that father did not satisfy his burden of proof by a preponderance of the evidence. Based on the record before us we cannot find—as a matter of law—that the evidence compels a contrary finding. (See *In re I.W.*, *supra*, 180 Cal.App.4th at p. 1528.) Further, there is substantial evidence to support the court's ruling, as well as the overriding statutory preference in favor of the children's adoption. (See *In re G.B.*, *supra*, 227 Cal.App.4th at p. 1166 [" " 'it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement" ' "].) Thus, the juvenile court properly found the benefit exception did not apply and the court did not err in ordering the termination of father's parental rights.

III. ICWA ISSUES

Finally, father contends, and respondent concedes, that the case must be remanded for additional notice and inquiry requirements under ICWA. We agree.

A. Background

Father's ICWA-020 form stated that he thought he had "Costanoan" Indian ancestry, which the department did not think was a federally recognized tribe. Grandmother (his mother) stated that she was an enrolled member of an Indian tribe, but was not certain which tribe and did not know her enrollment number. The department stated that it would follow up on this.

Mother's ICWA-020 form stated that she had Cherokee ancestry, but she was not able to provide information other than her parents' names, who were deceased, and the names of her grandparents. Notice was sent to the three Cherokee Tribes and the Bureau of Indian Affairs.

On July 31, 2017, the Eastern Band of Cherokee Indians sent letters regarding all three children, stating they were not registered or eligible to register as members of the tribe.

At the six-month review hearing March 6, 2018, the juvenile court found the ICWA inapplicable.

B. The ICWA

ICWA was enacted " 'to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture ....' [Citation.]" (*In re Isaiah W.* (2016) 1 Cal.5th 1, 8; see 25 U.S.C. § 1902.) Under ICWA, an "Indian child" is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."

(25 U.S.C. § 1903(4); see also Welf. & Inst. Code, § 224.1, subd. (a) [adopting federal definition of "Indian child"].)

Providing notice to Indian tribes of a child's dependency proceedings is essential to satisfying ICWA's purpose. (*In re Isaiah W., supra,* 1 Cal.5th at pp. 7-9.) Proper notice enables a tribe to determine whether the child is an Indian child and, if so, whether to intervene in, or exercise jurisdiction over, the child's dependency proceeding. (*Id.* at pp. 8-9.) To that end, ICWA requires that "[i]n any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a).) Consistent with ICWA, California law requires that where the court, a social worker, or a probation officer knows or has reason to know an Indian child is involved, notice must be provided to the parent, legal guardian or Indian custodian and the child's tribe. (§ 224.3, subd. (a); see also Cal. Rules of Court, rule 5.481(c)(1) [notice must be provided where "it is known or there is reason to know that an Indian child is involved in a proceeding listed in rule 5.480," including any dependency cases filed under section 300].)

"[T]he burden of coming forward with information to determine whether an Indian child may be involved and [the extent of] ICWA notice required in a dependency proceeding does not rest entirely—or even primarily—on the child and his or her family." (*In re Michael V.* (2016) 3 Cal.App.5th 225, 233.) Rather, "[j]uvenile courts and child protective agencies have 'an affirmative and continuing duty to inquire' whether a dependent child is or may be an Indian child." (*Ibid.*; see also *In re Isaiah W., supra,* 1 Cal.5th at pp. 9–11.) This affirmative duty to inquire is triggered whenever the child protective agency or its social workers "know[ ] or ha[ve] reason to know or believe that an Indian child is or may be involved" in the dependency proceeding. (Cal. Rules of

Court, rule 5.481(a)(4).) Once the duty is triggered, the social worker must, as soon as practicable, interview the parents, Indian custodian, extended family members, and any other person or agency, including the Bureau of Indian Affairs and the State Department of Social Services, who may have information concerning the child's membership status or eligibility. (§ 224.2, subd. (e); Cal. Rules of Court, rule 5.481(a)(4).)

As father contends, and respondent concedes, the record does not support a finding that the department conducted an adequate investigation concerning the children's possible Indian ancestry. The department stated it would follow through with grandmother on her membership and enrollment in an Indian tribe, but there is nothing in the record to suggest that it did so. Grandmother had multiple contacts with the department, and her whereabouts were known. (See *In re S.E.* (2013) 217 Cal.App.4th 610, 615-616 [omission of information relating to child's maternal great-great grandmother that pertains to family's claimed Indian ancestry prejudicial error under ICWA]; § 224.3, subd. (a)(5)(C) [ICWA notice must include, among other things, known information about the child's relatives, including, names, and dates and locations of birth and death].)

Father also contends there was information about mother's possible Indian ancestry that should have been explored, citing mother's statement to the social worker, when questioned about possible relative placement of the children, that she had a sister in Oregon. The record is silent as to whether the sister was contacted for purposes of ICWA information.

And both parties note error in the lack of proof of mailing and return receipts for the tribes noticed in the file. Section 244.3, subdivision (c) requires: "Proof of the notice, including copies of notices sent and all return receipts and responses received, shall be filed with the court in advance of the hearing …."

Based on the inadequacy of its investigation and the omissions in its ICWA notices, the department concedes a limited remand is necessary to fulfill its inquiry and

notice duties imposed by ICWA. We agree and, therefore, conditionally reverse the order terminating father's parental rights and remand the matter to ensure ICWA compliance.

DISPOSITION

The juvenile court's order terminating father's parental rights is conditionally reversed and the matter remanded to the juvenile court for the sole purpose of ensuring compliance with the ICWA notice and inquiry provisions. If, after a meaningful and thorough inquiry into the children's possible Indian ancestry is conducted and proper notice under ICWA is provided, the juvenile court finds the children to be Indian children, the court shall conduct a new permanency planning hearing under section 366.26 in conformity with all provisions of ICWA. If the juvenile court determines ICWA does not apply, the order terminating father's parental rights shall be reinstated.

FRANSON, J.

WE CONCUR:

HILL, P.J.

DETJEN, J.